

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* TIMOTHY WILLIAM DAKE,  
JARAD BOHART NIEMI,  
DONALD LEE HUGHES,  
JEFFREY JOHN KESTER,  
DONALD BROWN COMPTON,  
JONATHAN JAVIER CALDERAS,  
RICHARD GERARD SCHAFERMEYER and  
KEVIN PATRICK CHRISTMAS

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Appeal 2006-2158  
Application 09/853,391  
Technology Center

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Decided: January 31, 2007

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Before THOMAS A. WALTZ , PETER F. KRATZ, and  
CATHERINE Q. TIMM, *Administrative Patent Judges*.

TIMM, *Administrative Patent Judge*.

ORDER REMANDING TO THE EXAMINER

Our review of the record in this appeal leads us to conclude that this appeal is not ripe for a decision on the merits. The rejections reproduced in

the Answer are different from those set forth in the Final Office Action, and the rejections of the Answer have not been addressed by Appellants.

Therefore, the issues are not sufficiently crystallized to allow review. For this and other reasons, we remand this application to the jurisdiction of the Examiner for further action. Further explanation is provided below.

The Final Office Action lists the following rejections:

1. Claim 102 rejected under 35 U.S.C. § 112, ¶ 2;
2. Claim 102 rejected under 35 U.S.C. § 102(b);
3. Claims 1, 2, 14-29, 45-85, and 102 rejected under 35 U.S.C. § 103(a) over Ishida or Chuang in view of Sweet'n Low (tradename) and Kishimoto;
4. Claims 30-44 and 93-98 rejected under 35 U.S.C. § 103(a) over Ishida or Chuang in view of Sweet'n Low (tradename) and Kishimoto and Valentine, Menzi as applied to claims 1-85 and 102 above, and further in view of Kampanga.

After the Final Office Action, the Examiner withdrew the rejections under 35 U.S.C. § 102(b) and 112, ¶ 2 (Answer § 3). The Answer advances the following rejections for review on appeal:

1. Claims 1, 2, and 102 rejected under 35 U.S.C. § 103(a) over Ishida or Chuang in view of Sweet'n Low (trademark)(patent 3,625,711) to Eisenstadt and Kishimoto;
2. Claims 3-7 and 13 as rejected over the combined references as applied to claims 1, 2, and 102 above, and further in view of Valentine.

3. Claims 8-12 and 14-29 rejected over the above combined references as applied to claims 3-7 and 13 (Valentine) and claims 1, 2, and 102 (Ishida or Chuang in view of Sweet'n Low (Tradename) (patent 3,625,711) to Eisenstadt and Kishimoto) and further in view of Menzi.
4. Claims 30-85 and 93-98 rejected over the references of the above rejections as applied to the above claims 1-29 and 102 above, and further in view of Kampinga.

The Brief addresses the rejections as presented in the Final Office Action. There is no Reply Brief.

As can be seen from a comparison of the rejections of the Final Office Action and the Answer, there are a number of discrepancies.

As a first matter, the Answer rearranges the rejections both as to the claims rejected and the references applied.

As a second matter, the Answer rejects claims 3-13. Those claims were not listed in the statements of rejection presented in the Final Office Action.

As a third matter, the Answer includes "(patent 3,625,711) to Eisenstadt" in the statements of the rejections and lists this patent in the "Prior Art Record" section. The Examiner relies upon evidence within the patent to Eisenstadt to support the rejection of claims 1, 2, and 102. *See* the Answer at page 4, lines 7-9. The Examiner has, therefore, introduced new evidence into the rejection.

As a fourth matter, "Sweetener packet made by Safeway Stores" is listed in the "Prior Art of Record" section of the Answer and is discussed in

the body of the rejection of claims 1, 2, and 102, but this reference is not mentioned in the statement of this or any other rejection.

Because the rejections advanced in the Answer have not been responded to in any Brief and it is unclear whether Appellants were fully apprised of the specific grounds of rejection, this appeal is not ripe for our review, and we remand for further consideration of the rejections and clarification of the record.

This Remand to the Examiner pursuant to 37 C.F.R. § 41.50(a)(1) is made for further consideration of a rejection. Accordingly, 37 C.F.R. § 41.50(a)(2) applies if a supplemental examiner's answer is written in response to this Remand by the Board. A supplemental examiner's answer may include a new ground of rejection, but it must be made in accordance with the requirements enunciated in MPEP 1207.03(I)(8<sup>th</sup> ed., Rev. 5, Aug. 2006). If the Examiner files a supplemental examiner's answer, Appellants must respond in accordance with 37 C.F.R. § 41.39(b) by either requesting reopening of prosecution before the Examiner or by filing a reply brief to maintain the appeal. To avoid confusion, the reply brief must stand in place of the Brief and address each ground of rejection enunciated in the supplemental answer in accordance with 37 C.F.R. § 41.37.

We ORDER this application

REMANDED TO THE EXAMINER

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tf/clj

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